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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 463

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

STATEMENT OF APPELLEES NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION, ET AL., OF GROUNDS MAKING AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

GEORGE S. DIXON,
WALTER N. BIENEMAN,
MATHESON, DIXON AND BRADY,
Counsel for Appellees.

ELBERT R. GILLIOM,
GILLIOM, ARMSTRONG AND GILLIOM,
Of Counsel.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, TERRE HAUTE DIVISION

Civil Action No. 486

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY,

vs. *Plaintiff,*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants,

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION, AUTOMOBILE SHIPPERS, INCORPORATED, COMMERCIAL CARRIERS, INCORPORATED,

Intervening Defendants

STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION OF SUPREME COURT OF UNITED STATES ON APPEAL AND MOTION TO DISMISS OR AFFIRM BY APPELLEES NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION, AUTOMOBILE SHIPPERS, INCORPORATED, AND COMMERCIAL CARRIERS, INCORPORATED.

Pursuant to Rule 12(3) of the Rules of the Supreme Court of the United States, appellees National Automobile Transporters Association, Automobile Shippers, Inc., and Com-

mercial Carriers, Inc., (1) hereby file with the Clerk and Respectfully submit this Statement disclosing grounds making against the jurisdiction of the Supreme Court of the United States on appeal, which jurisdiction has been asserted by appellant in its Statement filed herein on October 23, 1952, and (2) hereby move that the Supreme Court of the United States dismiss this appeal, or, in the alternative, affirm the final decree and judgment of the District Court, entered on August 27, 1952.

I

Statement

These appellees state the following matters and grounds making against the jurisdiction of the Supreme Court of the United States on appeal:

1. The questions involved in said appeal are not substantial, within the meaning of Rule 12(1) of said Court, and as asserted in appellant's jurisdictional statement.

2. The questions on which the decision of the cause depends are so unsubstantial as not to need further argument, within the meaning of Rule 7(4) of said Court.

In support of the foregoing grounds, these appellees state the following further matters:

The Questions Involved

In an attempted compliance with Rule 12(1), appellant's Statement (pp. 15 and 16) asserts that the questions involved in the appeal are substantial, and that they are in substance the following:

(a) Whether the Interstate Commerce Commission's Order discloses a "rational basis" to support its conclusion that appellant had not proved its proposed rate to be just

and reasonable. (This same question is stated in substance in argumentative form at page 2 of appellant's Statement as the "Question Presented").

(b) Whether "a carrier may initiate competitive rates which are based on the added traffic theory".

(c) Whether, under applicable provisions of the Interstate Commerce Act, "the burden of proving the lawfulness of a rate which has gone into effect because a determination of its lawfulness has not been made by the Commission within the period of seven (7) months, provided for by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), is upon the carrier which has published the rate, or whether the burden is upon the opponents of such rate to prove that such rate is unjust, unreasonable or otherwise unlawful."

(d) Whether "findings of the Interstate Commerce Commission which find only that a carrier has failed to meet its burden of proof without indicating to the carrier the proper method of meeting its burden of proof are adequate findings either under the general law applicable to administrative procedure, or under the Federal Administrative Procedure Act."

None of the foregoing questions, to whatever extent the same may be involved in this appeal, is substantial upon the record in this case, as will be demonstrated in this Statement.

(a) Rational Basis for the Commission Order

The record of the Commission hearing (Exhibit I) and the findings of fact and opinion of the district court set forth the factual background of the proposed 41¢ rate. The automobile traffic to which this rate actually applies is that shipped from the Chrysler Corporation assembly plant at Evansville, Indiana, to St. Louis, Missouri. When this plant was first established in 1935, appellee Automobile

Shippers, Inc., began to transport these automobiles to St. Louis at the rate of 45¢ per hundred pounds (Exhibit I, p. 271). This motor carrier continued to handle this traffic until February, 1940, when appellant reduced its rail rate to 34¢ per hundred pounds, 12¢ below the then existing motor carrier rate, which resulted in appellant securing this traffic (Exhibit I, p. 272). There was no traffic moving during World War II, and said appellee did not regain this traffic until February, 1947, when it was returned to appellee at a rate eight cents above the rail rate. Said appellee continued to handle the traffic with the exception of five carloads in March of 1949, until appellant's controverted 41¢ rate became effective on March 13, 1951 (Exhibit I, p. 275).

When appellant filed the 41¢ rate on March 10, 1950, its existing rate was 62¢ per hundred pounds and the existing motor carrier rate was 64¢. The Louisville and Nashville Railroad Company, whose line is the direct rail route from Evansville to St. Louis (168 miles), at that time had a rate of 62¢ and did not join appellant, whose route from Evansville to St. Louis is 351 miles, in filing the 41¢ rate.

As emphasized in the district court opinion (page 6) and recognized in appellant's Statement (p. 8), the Commission did not decide the question of whether the proposed 41¢ rate was or was not compensatory, or just and reasonable. Its ultimate holding was that "The reduced rate under investigation has not been shown to be just and reasonable," and therefore should be cancelled. Its Order discloses upon its face ample "rational basis" for this conclusion and no substantial question with respect thereto is presented in this appeal.

The Commission Order, appearing in the record as Appendix A to the complaint, contains eight pages (sheets 2-10) of subsidiary findings supporting the ultimate finding that the rate had not been shown to be just and reasonable, which

was appellant's burden under the Interstate Commerce Act. Title 49, U.S.C. Section 15(7). Appellant's contention in substance is that these subsidiary findings, and particularly the Commission's findings as to the incompleteness and insufficiency of appellant's evidence on the anticipated cost of handling this automobile traffic, do not disclose a rational basis for the conclusion, in effect, that appellant has not discharged its burden of proving the rate reasonable.

Appellant recognizes in its Statement that it did not purport to furnish the Commission with proof of all costs of handling this traffic, but introduced evidence only of the additional "out-of-pocket" expenses anticipated if this traffic were handled by existing trains, without increase in motive power or crews (appellant's Statement, p. 9). Appellant's theory was that the operation of existing trains presently results in certain expenses, whether this automobile traffic is handled or not, and therefore the rate for the automobile traffic need only offset such additional expenses as will result purely from adding carloads of automobiles to those trains.

As observed in the district court opinion (p. 8), the Commission's findings furnish two rational bases for rejecting appellant's cost evidence: (1) Not all of the actual out-of-pocket costs of handling this automobile traffic were taken into account in appellant's cost studies; (2) Even if all additional costs of handling the new traffic had been taken into account, such evidence would not require a conclusion that the proposed rate would be compensatory, because it ignores the fair portion of other costs of operation which should be borne by such traffic.

Appellant's Statement asserts that the defects in its cost data specifically pointed out by the Commission are insignificant and do not impair the studies. If that were true, part of appellant's burden of proving the rate compensa-

tory was to prove that any omitted costs were insignificant. When the Commission saw that a number of elements had not been taken into account, it was not bound to assume that they were insignificant, especially since common knowledge shows that they may be very substantial, at least in total effect. The Commission could not be expected, much less required, to guess whether the absent elements were substantial. It was clearly the burden of the appellant, who is the only party having possession of the information, to prove that the omission of traditional cost elements did not materially affect its estimates.

But equally fundamental is the fallacy of the contending that the shipper of these automobiles cannot be required, through adequate rates, to pay the fair share which this traffic should bear of *all* of appellant's operating expenses. The best illustration is the substantial expense item of depreciation on the 291 automobile freight cars which appellant owned and which would be used in whole or in part for these shipments. The Commission found the cost studies defective for failure to include that cost, among others (sheets 8, 9). In its jurisdictional statement (page 12) appellant begs the question by saying in substance that its cars will depreciate, and accruals will be made to its depreciation reserve, whether the cars are used or not, and therefore exclusion of this cost is not a rational basis for rejecting its cost evidence. Merely to state the proposition shows its unsoundness. As the Commission Order pointed out, the rate paid by this traffic should be sufficient to include an allowance for the cost of replacing the very cars which are consumed in handling the traffic. If the very traffic for which these cars are used does not pay for their consumption and use and for their replacement, who will?—the shippers of food, coal, raw materials and the many other items carried by appellant, many of whom cannot bear the

expense as well as the automobile industry, which should stand on its own feet if any industry does.

In addition to depreciation on these particular cars, appellant's cost evidence failed to take into account this traffic's share of depreciation on locomotives, track and structures, general taxes, return on property devoted to public service, and many other substantial elements which bear on whether the 41¢ rate is truly compensatory and reasonable. The omission of the depreciation item alone is a sufficient rational basis for rejection of the only evidence which appellant introduced on the cost issue to sustain its burden of proving the rate compensatory.

In an effort to establish that the proposed 41¢ rate was necessary to enable it to obtain a part of this automobile traffic, appellant contended before the Commission that it was under a "Disability" of 23¢ per hundred pounds in competing with the superior door-to-door motor carrier service, for the reason that it costs 13¢ per hundred pounds to load a rail car with automobiles at Evansville and 10¢ per hundred pounds to unload it at St. Louis. The Commission record (Exhibit I) shows that while appellant introduced some fragmentary evidence as to the unloading costs at St. Louis, it did not attempt to prove facts from which the Commission could find the actual loading and unloading costs or conclude that 23¢ was the actual competitive disability. When asked specifically about this by the examiner, appellant's counsel said that it was submitting its case on the basis solely of the statement of the prospective shipper (Chrysler Corporation) "that it would be necessary for the C. & E. I. to publish a rate of 41¢, in order for it to secure a share of this traffic." (Exhibit I, pp. 12; 130-133).

Substantial direct testimony and cross examination of appellant's witnesses established that Chrysler Corporation was not concerned with the dealers' cost of unloading

automobiles from rail cars, and that for many years it had been the practice of that shipper to use rail transportation unless the differential between the two rates was less than ten or twelve cents (Exhibit I, pp. 70, 72, 73, 266, 276; Opinion, page 11). On this state of the evidence the Commission in substance found that the evidence was not sufficient to establish the necessity of the rate, expressly stating (Commission Order, sheet 10) "Nor can we find upon this record any adequate support for the claim that a rate as low as that here proposed is necessary to enable the respondent (appellant) to regain a fair share of this traffic."

To whatever extent proof of the competitive necessity of the proposed rate was essential to reasonableness, appellant had the burden of proof under the statute. The Commission certainly had a rational basis for the conclusion that this burden was not discharged. It was not bound by law to accept as binding one shipper's self-serving statement that it would take a rail rate 23¢ below the truck rate to interest it in shipping by rail. If this kind of evidence, not based upon a reasonably complete analysis of costs peculiar to rail transportation, were to require a finding of necessity, many rates would in substance be fixed by the shipper rather than by the public body established by statute to protect the interests of all shippers, carriers and the public. Clearly the Commission is not that helpless, nor the law that ineffective.

Thus, the Commission in its Order clearly stated that appellant had not shown the rate to be just and reasonable, and stated several valid reasons why its cost estimates could not be accepted as satisfactory proof that the rate would be compensatory. It left no doubt as to the reason for its conclusion, as the district court opinion observes (p. 10). The finding and statements of reasons in the Order are all that can be expected of an administrative body in a case where

the party with the burden of proof has "failed to hurdle the primary barrier of presenting sufficient evidence to provide a basis for raising any issue as to the compensatory nature of the proposed rate" (Opinion, p. 8).

These appellees respectfully submit that the Order adequately states the Commission's "findings and conclusions, as well as the reasons or basis therefor", as required by the administrative procedure act (Title 5, U.S.C. Section 1007 (b)), contains all findings necessary under general considerations of law, as recently stated in *Alabama Great Southern Railroad Company, et al.* v. *United States*, 340 U. S. 216, 95 L. Ed. 225 (1951), and upon the whole record is supported in all essential respects by substantial evidence within the principle of *Universal Camera Corporation* v. *N. L. R. B.*, 340 U. S. 216, 95 L. Ed. 456 (1951). These considerations appear so clearly from the face of the Commission Order and from the findings of fact and opinion of the district court that no substantial question with respect thereto exists on this appeal.

(b) Must the Commission approve a Rate on Added Traffic Theory?

Appellant asserts in its jurisdictional statement (p. 16) that this appeal presents the question whether "a carrier may initiate competitive rates which are based on the added traffic theory." The real crux of this asserted question is whether the Interstate Commerce Commission is *required as a matter of law* to approve a rate which will absorb only the estimated increase in out-of-pocket operating expenses resulting from the addition of the subject traffic to existing trains.

First, this question does not arise for decision in this appeal unless it is first decided that as a matter of law appellant sustained its burden of proving *all* of the reasonably

probable increases in out-of-pocket operating expenses which would result from adding this traffic, but that the Commission refused to approve the rate solely because it is insufficient to reimburse operating costs other than those computed on the added traffic theory.

As demonstrated in part (a) of this Statement, the Commission Order points out several different elements of out-of-pocket expenses of handling existing traffic which are omitted from appellant's basic cost evidence, resulting in an understatement of the probable added expense of handling the new traffic. Upon failure by appellant to introduce satisfactory evidence showing *all* added costs, the Commission was not called upon to decide specifically whether, if all of such added costs had been proved, the rate should be approved on the added traffic theory. That "the Commission did not pass on the question whether a rate based on the added traffic theory could be lawful" is acknowledged by appellant's Statement (p. 8) and in the district court's opinion (p. 13), and the district court likewise did not purport to decide that issue, having found that the Commission's rejection of the out-of-pocket cost data had a rational basis in the Order. It is respectfully submitted that in view of the foregoing, the question does not arise for determination on this appeal.

Second, if the question were necessarily presented for decision on this appeal, these appellees respectfully submit that said question is not substantial in nature, for the reason following:

Appellant's contention is, in substance, that when a carrier volutarily files a rate which will pay the bare increase in its out-of-pocket operating expenses resulting from the handling of the subject commodity as added traffic, plus some profit, the Interstate Commerce Commission has no discretion in the premises, but as a matter of law must

approve the rate, even though it bears no part of the over-all costs of operating the carrier's service.

The Interstate Commerce Act gives the Commission the broad regulatory power to determine and prescribe just and reasonable rates for common carriers. Title 49, U.S.C. Section 15(1). This court has acknowledged that the Commission has a broad discretion in determining whether a particular rate is just and reasonable under all of the circumstances, and that in making such determination the Commission must take into consideration the interests of producers, consumers, carriers and the public generally, which often involves great complexities. It also must consider, in the exercise of that discretion, the relationship between competing types of service. There is no single test by which "just" and "reasonable" may be ascertained, and the determination of the administrative body within its discretion is not disturbed by the courts so long as the Commission acts within its statutory power and within the zone of reasonableness. *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216, 95 L. Ed. 225 (1951); *Ayrshire Collieries Corporation* v. *United States*, 335 U. S. 573, 93 L. Ed. 243 (1948).

Neither this court nor any other, to the knowledge of these appellees, has held that the discretion of the Interstate Commerce Commission is so limited that it is required as a matter of law to approve a rate voluntarily filed by a carrier which will reimburse the carrier for estimated added out-of-pocket expenses, but will not pay the full cost of transporting the commodity, plus some return. While there might be some instances in which rates on the added traffic theory might properly be approved, the conclusion does not follow that the Commission is required in every instance to approve rates so computed.

In its jurisdictional statement (p. 14), appellant refers

to the case of *Lang* v. *Railroad Commission of California*, 2 Cal. (2d) 550, 42 Pac. (2d) 639, (1935), as giving support to its contention. There certain railroads filed with the Railroad Commission of California reduced rates for the transportation of petroleum products, and the rates were suspended by the Commission pending a hearing thereon. At the hearing *private* truck carriers, who had been competing with the railroads over a long period for this traffic, objected to the reductions, although the evidence clearly showed that the reduced rates would pay the out-of-pocket costs of hauling the commodity. The Commission, in the exercise of its regulatory discretion, approved the reduced rates and permitted them to go into effect, vacating the suspension orders. It was this order of the Commission which was under review in the court.

In holding that the Commission had acted within its power in approving these rates, the court emphasized the fact that the Railroad Commission had no jurisdiction over the rates of the private truck carriers, and therefore was unable to maintain a differential between rates of the two types of carriers which would solve the competitive situation. It would have always been possible for the trucks to undercut the rail rates fixed by the Commission. It was in those circumstances that the court held that the Commission acted properly within its discretion in approving the rates on the added traffic theory.

It is obvious that the cited case lends no support to appellant's contention that the Interstate Commerce Commission, which has jurisdiction over the rates of both rail and motor carriers and can regulate the differential between such rates so as properly to take into account competitive factors, is required as a matter of law to approve a rail rate which will reimburse only added out-of-pocket costs. The fallacy in

appellant's contention is so palpable as to render this asserted question unsubstantial on this appeal.

(c) Was the Burden of Proof Affected by the Fact That the Rate Became Effective Before the Commission Order was Issued?

Appellant's Statement (p. 16) says that there is presented on this appeal an important "subsidiary question", whether, when a filed rate goes into effect upon expiration of the period during which the Commission may suspend it, and before the Commission Order is issued, the burden is on the carrier to prove the rate reasonable or upon its opponents to prove it unreasonable or unlawful.

So that this asserted question may be considered accurately as it applies to the record in this case, the chronology of the proceedings before the Commission must be kept in mind. After the proposed 41¢ rate was filed by appellant on March 10, 1950, these appellees filed with the Commission their protests and request for investigation and suspension on April 10, whereupon the Commission ordered the rate suspended on April 12, 1950. While the rate was still under suspension and investigation, the Commission commenced its hearing on June 19 and concluded it on June 21, 1950. There can be no doubt that at that hearing appellant had the burden of proving the proposed rate just and reasonable. Section 15(7), Title 49 U. S. C., provided:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such

questions preference over all other questions pending before it and decide the same as speedily as possible."

After the hearing, but before the examiner served his proposed report, the maximum statutory period of rate suspension (seven months) expired, and appellant voluntarily extended the suspension from November 12, 1950 to March 12, 1951, but declined to continue the suspension after that date, whereupon the rate went into effect. Subsequently, on April 12, 1951, the examiner served his proposed report, to which appellant filed exceptions. The Commission report and order were issued on September 21, 1951.

Thus, appellant's contention in substance is that, although under the statute it clearly had the burden of proving the rate just and lawful at the hearing, the fact that the Commission Order was not issued until after the rate had been permitted to go into effect by lapse of time removed this burden from appellant and placed upon appellees the burden of proving the rate unreasonable or unlawful. This contention, and the question which appellant claims is raised by it, are clearly without substance.

In the first place, the statute, which expressly placed the burden of proof upon appellant at the hearing, contains no provision for the shifting of that burden merely because the Commission Order may issue after the power of the Commission to suspend the rate has expired. Nor is there any requirement in the statute that the examiner serve his proposed report or the Commission issue its Order before expiration of the maximum suspension period. Of course, once the hearing has been concluded and the matter is being considered by the Commission, it would be impossible retroactively to change the burden of proof at that hearing from one party to the other, and it is clear that Congress had no such intention in delineating the procedure before the Commission and the burden of proof therein. Neither could the

fact that the rate was permitted to become effective have any prospective force with respect to burden of proof, because no further hearing before the Commission was provided or contemplated by the statute, or required by any other consideration of law.

Furthermore, the issue of who had the burden of proof at the Commission hearing was not presented to the district court for decision. Although appellant in its complaint charged that the Commission had acted unlawfully in regarding that the burden was upon appellant, its counsel stated in substance in open court, at the hearing before the district court, that the burden of proving the rate unreasonable was upon appellant, which statement had the effect of eliminating that question from the district court's consideration. (Official Reporter's Transcript, pp. 12-13.) The question of burden of proof was never argued or briefed before the district court, and the statement in its opinion (page 9) with respect to burden of proof is merely a recital of the rule which underlay the Commission's conclusion, and was not a decision of a controverted issue by the district court.

In view of the foregoing, these appellees respectfully submit that this question is not presented on this appeal, but that if it were presented, it has no substance upon the facts shown by the record.

(d) Must the Commission Order Indicate to the Carrier "The Proper Method of Meeting Its Burden of Proof?"

The last question which appellant's Statement (p. 16) says is presented on this appeal is whether, when the Commission finds that a carrier has failed to meet its burden of proof, such findings are sufficient without indicating to the carrier the proper method of meeting that burden.

So long as the basic "quasi-jurisdictional" findings essential to the validity of the Commission's Order are made therein, and the reasons or bases therefor appear sufficiently to permit the reviewing court to conclude that the Commission's conclusions are not without a rational basis, the Order satisfies the requirements of the law.

Alabama Great Southern Railroad Company v. *United States,* 340 U. S. 216, 95 L. Ed. 225 (1951);

Administrative Procedure Act, Title 5, U.S.C. Section 1007(b).

So long as the Order states the necessary findings and reasons for the decision, there is no requirement that the Commission specify the weight given to any item of evidence or disclose the mental operation by which its decision is reached.

B. & O. Railroad Company v. *United States,* 298 U. S. 349, 359, 56 S. Ct. 797, 803, citing;

Meeker and Co. v. *Lehigh Valley R. Co.,* 236 U. S. 412, 427; 35 S. Ct. 328; 59 L. Ed. 644;

Florida v. *United States,* 282 U. S. 194, 215; 51 S. Ct. 119; 75 L. Ed. 291;

United States v. *Baltimore & Ohio R. Co.,* 293 U. S. 454, 464; 55 S. Ct. 268; 79 L. Ed. 587;

Beaumont S. L. & W. R. Co. v. *United States,* 282 U. S. 74, 86; 51 S. Ct. 1; 75 L. Ed. 221.

No statute or principle of law places upon the Commission the burden of setting forth a formula, or of otherwise instructing a carrier as to just what evidence would discharge carrier's burden of proving the rate reasonable. While the Commission might have the power under its rule-making functions to suggest certain standards for establishing the cost of transporting a commodity, it is not required to instruct a carrier as to how to discharge its burden of proof

as a necessary part of an Order determining that such burden has not been met in a particular hearing. The findings as to the insufficiency of appellant's cost data in the instant Order are sufficient to indicate to appellant the reasons why its evidence on that issue could not be accepted by the Commission as discharging its burden of proof. Certainly the law does not require the Commission to go further in its Order and give the carrier a course of instruction on how to conduct a rate case, particularly in view of the fact that there may be pertinent factors bearing upon the reasonableness of the rate which were not developed by any party on the first hearing but which might be placed in issue at a later hearing, there might be changes in the facts which would render some elements material and others immaterial, and other variable circumstances might cause certain elements to be essential in establishing the reasonableness of a rate at one time, but not at another time.

There being no support whatever for appellant's contention that the Commission was required to indicate to it how to meet its burden of proof, the asserted question is completely without substance.

II

MOTION

In view of the foregoing Statement and the grounds and considerations set forth therein, these appellees respectfully move that the Supreme Court of the United States:

1. Dismiss this appeal, on the ground that the questions involved therein are not substantial, within the meaning of Rule 12(1) of said Court; or, in the alternative,

2. Affirm the final decree and judgment of the district court, entered on August 27, 1952, on the ground that the questions on which the decision of the cause depends are so

unsubstantial as not to need further argument, within the meaning of Rule 7(4) of said Court.

Dated November 12, 1952.

Respectfully submitted,

MATHESON, DIXON & BRADY,
2150 Guardian Building,
Detroit 26, Michigan,

By GEORGE S. DIXON,
By WALTER N. BIENEMAN,

GILLIOM, ARMSTRONG AND GILLIOM,
By ELBERT R. GILLIOM,
1344 Consolidated Building,
Indianapolis 4, Indiana,

Attorneys for Appellees National Automobile Transporters Association, Automobile Shippers, Inc., and Commercial Carriers, Inc.